

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REV- OCATION OR SUSPENSION OF PERMITS

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APPENDIX TO PART 22—ADDRESSES OF EPA REGIONAL OFFICES

AUTHORITY: 15 U.S.C. 2615; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547(d), 7601 and 7607(a); 7 U.S.C. 136(l) and (m); 33 U.S.C. 1319, 1415 and 1418; 42 U.S.C. 6912, 6928 and 6991(e); 42 U.S.C. 9609; 42 U.S.C. 11045.

SOURCE: 45 FR 24363, Apr. 9, 1980, unless otherwise noted.

Subpart A—General

§22.01 Scope of these rules.

(a) These rules of practice govern all adjudicatory proceedings for:

(1) The assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 1361(a));

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(2) The assessment of any administrative penalty under sections 113(d)(1), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (CAA) (42 U.S.C. 7413(d)(1), 7524(c), 7545(d) and 7547(d)).

(3) The assessment of any civil penalty or for the revocation or suspension of any permit conducted under section 105 (a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a));

(4) The issuance of a compliance order or the issuance of a corrective action order, the suspension or revocation of authority to operate pursuant to section 3005(e) of the Solid Waste Disposal Act, or the assessment of any civil penalty under sections 3008, 9006 and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6928, 6991(e) and 6992(d)), except as provided in 40 CFR parts 24 and 124.

(5) The assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a));

(6) The assessment of any Class II penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g));

(7) The assessment of any administrative penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) (42 U.S.C. 11045).

(9) The assessment of any civil penalty conducted under section 1414(g)(3)(B) of the Safe Drinking Water Act as amended (42 U.S.C. 300g-3(g)(3)(B)).

(b) The Supplemental rules of practice set forth in subpart H establish rules governing those aspects of the proceeding in question which are not covered in subparts A through G, and also specify procedures which supersede any conflicting procedures set forth in those subparts.

(c) Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

[45 FR 24363, Apr. 9, 1980, as amended at 52 FR 30673, Aug. 17, 1987; 53 FR 12263, Apr. 13, 1988; 54 FR 12371, Mar. 24, 1989; 54 FR 21176, May 16, 1989; 56 FR 3757, Jan. 30, 1991; 57 FR 4318, Feb. 4, 1992]

§ 22.02 Use of number and gender.

As used in these rules of practice, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 22.03 Definitions.

(a) The following definitions apply to part 22:
Act means the particular statute authorizing the institution of the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95-251, 92 Stat. 183).

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Complainant means any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer, or any other person who will participate or advise in the decision.

Complaint means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person under §§ 22.13 and 22.14.

Consent Agreement means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

Environmental Appeals Board means the Board within the Agency described in § 1.25 of this title, located at U.S. Environmental Protection Agency, A-110, 401 M St. SW., Washington, DC 20460.

Final Order means (a) an order issued by the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of a matter in controversy between the parties, or (b) an initial decision which becomes a final order under § 22.27(c).

Hearing means a hearing on the record open to the public and conducted under these rules of practice.

Hearing Clerk means the Hearing Clerk, A-110, U.S. Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Initial Decision means the decision issued by the Presiding Officer based upon the record of the proceedings out of which it arises.

Party means any person that participates in a hearing as complainant, respondent, or intervenor.

Permit means a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act.

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of

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any State or local unit of government, or of any foreign government.

Presiding Officer means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer, unless otherwise specified by any supplemental rules.

Regional Administrator means the Administrator of any Regional Office of the Agency or any officer or employee thereof to whom his authority is duly delegated. Where the Regional Administrator has authorized the Regional Judicial Officer to act, the term *Regional Administrator* shall include the Regional Judicial Officer. In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term *Regional Administrator* as used in these rules shall mean the Administrator.

Regional Hearing Clerk means an individual duly authorized by the Regional Administrator to serve as hearing clerk for a given region. Correspondence may be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency (address of Regional Office—see appendix). In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term *Regional Hearing Clerk* as used in these rules shall mean the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.04(b) to serve as a Regional Judicial Officer.

Respondent means any person proceeded against in the complaint.

(b) Terms defined in the Act and not defined in these rules of practice are used consistent with the meanings given in the Act.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5323, Feb. 13, 1992]

§ 22.04 Powers and duties of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, and the Presiding Officer; disqualification.

(a) *Environmental Appeals Board.* The Administrator delegates authority under the Act to the Environmental Appeals Board to perform the functions assigned to it in these rules of practice. An appeal or motion under this part directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring any case or motion governed by this part to the Administrator when the Environmental Appeals Board, in its direction, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be

interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate the ex parte rules set forth in § 22.08.

(b) *Regional Administrator.* The Regional Administrator shall exercise all powers and duties as prescribed or delegated under the Act and these rules of practice.

(1) *Delegation to Regional Judicial Officer.* One or more Regional Judicial Officers may be designated by the Regional Administrator to perform, within the region of their designation, the functions described below. The Regional Administrator may delegate his or her authority to a Regional Judicial Officer to act in a given proceeding. This delegation will not prevent the Regional Judicial Officer from referring any motion or case to the Regional Administrator. The Regional Judicial Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules of practice.

(2) *Qualifications of Regional Judicial Officer.* A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or some other Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any hearing in which he serves as a Regional Judicial Officer or with any factually related hearing.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:

(1) Conduct administrative hearings under these rules of practice;

(2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

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(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(d) *Disqualification; withdrawal.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they (i) have a financial interest or (ii) have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion made to the Regional Administrator request that the Regional Judicial Officer be disqualified from the proceeding. Any party may at any time by motion to the Administrator request that the Regional Administrator, a member of the Environmental Appeals Board, or the Presiding Officer be disqualified or request that the Administrator disqualify himself or herself from the proceeding. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may at any time withdraw from any proceeding in which they deem themselves disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned to replace him. Assignment of a replacement for Regional Administrator or for the Regional Judicial Officer shall be made by the Administrator or the Regional Administrator, respectively. The Administrator, should he or she withdraw or disqualify himself or herself, shall assign the Regional Administrator from the Region where the case originated to replace him or her. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another region to replace the Administrator. The Regional Administrator shall assign a new Presiding Officer if the original Presiding Officer was not an Administrative Law Judge. The Chief Administrative Law Judge shall assign a new Presiding Officer from among available Administrative Law Judges if the original Presiding Officer was an Administrative Law Judge.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992; 57 FR 60129, Dec. 18, 1992]

§ 22.05 Filing, service, and form of pleadings and documents.

(a) *Filing of pleadings and documents.* (1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the Regional Hearing Clerk.

(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Regional Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.

(3) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Regional Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy shall be sent to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Regional Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

(b) *Service of pleadings and documents—*(1) *Service of complaint.* (i) Service of a copy of the signed original of the complaint, together with a copy of these rules of practice, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative).

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.

(iii) Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any

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manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii) of this section.

(iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the complaint in the manner prescribed by the law of the State for the service of process on any such persons, or:

(A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof;

(B) If upon a State or local officer by delivering a copy to such officer.

(v) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

(2) *Service of documents other than complaint, rulings, orders, and decisions.* All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.

(c) *Form of pleadings and documents.* (1) Except as provided herein, or by order of the Presiding Officer or of the Environmental Appeals Board, there are no specific requirements as to the form of documents.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

(5) The Environmental Appeals Board, the Regional Administrator, the Presiding Officer, or the Regional Hearing Clerk may refuse to file any document which does not comply with this paragraph. Written notice of such refusal, stating the

reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer, as appropriate.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992]

§22.06 Filing and service of rulings, orders, and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer, as appropriate, shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Environmental Appeals Board. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer, as appropriate.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992]

§22.07 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Environmental Appeals Board, the Regional Administrator, or the Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon its or his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(c) *Service by mail.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the

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time allowed by these rules for the filing of a responsive pleading or document.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5324, Feb. 13, 1992]

§ 22.08 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.09 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Environmental Appeals Board, as appropriate.

(b) The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. The Agency may waive this cost in appropriate cases.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to

the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention.

(a) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (c) of this section, within ten (10) days after service of the motion for leave to intervene.

(b) *When filed.* A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in the absence of a prehearing conference, before the initiation of correspondence under § 22.19(e), or if there is no such correspondence, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the information set forth in paragraph (a) of this section, a statement of good cause for the failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding.

(c) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(d) *Amicus curiae.* The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. If the motion is granted, the Presiding Officer or the Environmental Appeals Board shall issue an order setting the time for filing such brief.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and

simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(b) *Severance*. The Presiding Officer may, by motion or sua sponte, for good cause shown order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Issuance of complaint.

If the complainant has reason to believe that a person has violated any provision of the Act, or regulations promulgated or a permit issued under the Act, he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and these rules of practice. If the complainant has reason to believe that

(a) A permittee violated any term or condition of the permit, or

(b) A permittee misrepresented or inaccurately described any material fact in the permit application or failed to disclose all relevant facts in the permit application, or

(c) Other good cause exists for such action, he may institute a proceeding for the revocation or suspension of a permit by issuing a complaint under the Act and these rules of practice. A complaint may be for the suspension or revocation of a permit in addition to the assessment of a civil penalty.

§ 22.14 Content and amendment of the complaint.

(a) *Complaint for the assessment of a civil penalty*. Each complaint for the assessment of a civil penalty shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;

(3) A concise statement of the factual basis for alleging the violation;

(4) The amount of the civil penalty which is proposed to be assessed;

(5) A statement explaining the reasoning behind the proposed penalty;

(6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.

A copy of these rules of practice shall accompany each complaint served.

(b) *Complaint for the revocation or suspension of a permit*. Each complaint for the revocation or suspension of a permit shall include:

(1) A statement reciting the section(s) of the Act, regulations, and/or permit authorizing the issuance of the complaint;

(2) Specific reference to each term or condition of the permit which the respondent is alleged to have violated, to each alleged inaccuracy or misrepresentation in respondent's permit application, to each fact which the respondent allegedly failed to disclose in his permit application, or to other reasons which form the basis for the complaint;

(3) A concise statement of the factual basis for such allegations;

(4) A request for an order to either revoke or suspend the permit and a statement of the terms and conditions of any proposed partial suspension or revocation;

(5) A statement indicating the basis for recommending the revocation, rather than the suspension, of the permit, or vice versa, as the case may be;

(6) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed revocation or suspension.

A copy of these rules of practice shall accompany each complaint served.

(c) *Derivation of proposed civil penalty*. The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

(d) *Amendment of the complaint*. The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

(e) *Withdrawal of the complaint*. The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate.

§ 22.15 Answer to the complaint.

(a) *General*. Where respondent: (1) Contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer

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to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

(c) *Request for hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 22.05(b)(2).

(b) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, the Regional Administrator, or the Environmental Appeals Board, as appropriate, may set a shorter time for response, or make such orders concerning the disposition of motions as they deem appropriate.

(c) *Decision.* Except as provided in § 22.04(d)(1) and § 22.28(a), the Regional Administrator shall rule on all motions filed or made before an answer to the complaint is filed. The Environmental Appeals Board shall rule on all motions filed or made after service of the initial decision upon the parties. The Administrator shall rule on

all motions filed or made after service of the initial decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, the Regional Administrator, or the Environmental Appeals Board considers it necessary or desirable.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992; 57 FR 60129, Dec. 18, 1992]

§ 22.17 Default order.

(a) *Default.* A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default. If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Administrator in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) *Procedures upon default.* When Regional Administrator or Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. This order shall constitute the initial decision, and shall be filed with the Regional Hearing Clerk.

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed or the terms and conditions of permit revocation or suspension, as appropriate.

(d) For good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order.

§22.18 Informal settlement; consent agreement and order.

(a) *Settlement policy.* The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer under § 22.16.

(b) *Consent agreement.* The parties shall forward a written consent agreement and a proposed consent order to the Regional Administrator whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) *Consent order.* No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. In preparing such an order, the Regional Administrator may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

§22.19 Prehearing conference.

(a) *Purpose of prehearing conference.* Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

- (1) The settlement of the case;
- (2) The simplification of issues and stipulation of facts not in dispute;
- (3) The necessity or desirability of amendments to pleadings;
- (4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;
- (5) The limitation of the number of expert or other witnesses;
- (6) Setting a time and place for the hearing; and
- (7) Any other matters which may expedite the disposition of the proceeding.

(b) *Exchange of witness lists and documents.* Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) The names of the

expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless (1) the Presiding Officer determines that there is good cause to hold it at another location in a region or by telephone, or (2) the Supplemental rules of practice provide otherwise.

(e) *Unavailability of a prehearing conference.* If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(f) *Other discovery.* (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

- (i) That such discovery will not in any way unreasonably delay the proceeding;
- (ii) That the information to be obtained is not otherwise obtainable; and
- (iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

- (i) The information sought cannot be obtained by alternative methods; or
- (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not

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be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth;

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under § 22.17(a).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedure

§ 22.21 Scheduling the hearing.

(a) When an answer is filed, the Regional Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who shall assign himself or another Administrative Law Judge as Presiding Officer, unless otherwise provided in the Supplemental rules of practice. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer under § 22.15(c), the Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence *in camera*, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Verified statements.* The Presiding Officer may admit an insert into the record as evidence,

in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term “unavailable” shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter’s contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Regional Hearing Clerk his initial decision as soon as practicable after the period for filing reply briefs under § 22.26 has expired. The Presiding Officer shall

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retain a copy of the complaint in the duplicate file. The initial decision shall contain his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Hearing Clerk. The Hearing Clerk shall forward a copy of the initial decision to the Environmental Appeals Board.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within ten (10) days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties an answer thereto. The Presiding Officer shall announce his intent to grant or deny such motion as soon as

practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as the motion is denied or the reopened hearing is concluded.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Except as provided in this section, appeals to the Environmental Appeals Board shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss issued under § 22.20(b)(1), or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Environmental Appeals Board on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) *Decision.* If the Environmental Appeals Board determines that certification was improvidently granted, or if the Environmental Appeals Board takes no action within thirty (30) days of the certification, the appeal is dismissed. When the Presiding Officer declines to certify an order or ruling to the Environmental Appeals Board on interlocutory appeal, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be made within six (6) days of service of an order of the Presiding Officer refusing to certify a ruling for interlocutory appeal to the Environmental Appeals Board. Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made by the Presiding

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Officer. The Environmental Appeals Board may, however, allow further briefs and oral argument.

(d) *Stay of proceedings.* The Presiding Officer may stay the proceedings pending a decision by the Environmental Appeals Board upon an order or ruling certified by the Presiding Officer for an interlocutory appeal. Proceedings will not be stayed except in extraordinary circumstances. Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Environmental Appeals Board.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision. The appellant's brief shall contain a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate references to the record.

(2) Within fifteen (15) days of the service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Environmental Appeals Board a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. Reply briefs shall be limited to the scope of the appeal brief. Further briefs shall be filed only with the permission of the Environmental Appeals Board.

(b) *Sua sponte review by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines sua sponte to review an initial decision, the Environmental Appeals Board shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.

(c) *Scope of appeal or review.* If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give counsel for the parties reason-

able written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Environmental Appeals Board from remanding the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, upon request of a party or sua sponte, assign a time and place for oral argument after giving consideration to the convenience of the parties.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5325, Feb. 13, 1992]

Subpart G—Final Order on Appeal

§ 22.31 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Environmental Appeals Board issues a notice of intent to conduct a review sua sponte, the Environmental Appeals Board shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Environmental Appeals Board shall adopt, modify, or set aside the findings and conclusions contained in the decision or order being reviewed and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may, in its discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty.

(b) *Payment of a civil penalty.* The respondent shall pay the full amount of the civil penalty assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Treasurer, United States of America.

[45 FR 24363, Apr. 9, 1980, as amended at 57 FR 5326, Feb. 13, 1992]

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that

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the Environmental Appeals Board has referred to the Administrator pursuant to § 22.04(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the Environmental Appeals Board.

[57 FR 5326, Feb. 13, 1992]

Subpart H—Supplemental Rules

§ 22.33 Supplemental rules of practice governing the administrative assessment of civil penalties under the Toxic Substances Control Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding consolidated rules of practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the agency.

§ 22.34 Supplemental rules of practice governing the administrative assessment of civil penalties under title II of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under sections 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* (1) Prior to the issuance of an administrative penalty order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Such notice shall be provided by the issuance of a complaint pursuant to § 22.13 of the Consolidated Rules of Practice.

(2) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Hearing Clerk within thirty (30) days after service of the complaint.

(c) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of:

- (i) The grounds and necessity therefor, and
- (ii) The materiality and relevancy of the evidence to be adduced.

Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by EPA.

[57 FR 4318, Feb. 4, 1992]

§ 22.35 Supplemental rules of practice governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1261(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties.

(c) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act, (1) respondent's history of compliance with the Act or

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its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the FEDERAL REGISTER (39 FR 27711), and any amendments or supplements thereto.

§ 22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications conducted under section 105(a) or (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Additional criterion for the issuance of a complaint for the revocation or suspension of a permit.* In addition to the three criteria listed in 40 CFR 22.13 for issuing a complaint for the revocation or suspension of a permit, complaints may be issued on the basis of a person's failure to keep records and notify appropriate officials of dumping activities, as required by 40 CFR 224.1 and 223.2.

§ 22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928) (the "Act"). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* Whenever, on the basis of any information, the Administrator determines that any person is in violation of (1) any requirement of subtitle C of the Act, (2) any regulation promulgated pursuant to subtitle C of the Act, or (3) a term or condition of a permit issued pursuant to subtitle C of the Act, the Administrator shall issue notice to the alleged violator of his failure to comply with such requirement, regulation or permit.

(c) *Content of notice.* Each notice of violation shall include:

(1) A specific reference to each provision of the Act, regulation, or permit term or condition which the alleged violator is alleged to have violated; and

(2) A concise statement of the factual basis for alleging such violation.

(d) *Service of notice.* Service of notice shall be made in accordance with § 22.05(b)(2) of the Consolidated Rules of Practice.

(e) *Issuance of the complaint.* (1) Except as provided in paragraph (e)(3) of this section, the complainant may issue a complaint whenever he has reason to believe that any violation extends beyond the thirtieth day after service of the notice of violation.

(2) The complaint shall include, in addition to the elements stated in § 22.14 of the Consolidated Rules, an order requiring compliance within a specified time period. The complaint shall be equivalent to the compliance order referred to in section 3008 of the Act.

(3) Whenever a violation is of a non-continuous or intermittent nature, the Administrator may issue a complaint, without any prior notice to the violator, pursuant to § 22.14 of the Consolidated Rules of Practice which may also require the violator to take any and all measures necessary to offset all adverse effects to health and the environment created, directly or indirectly, as a result of the violation.

(4) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after the filing of the complaint.

(f) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(g) *Final Orders to Federal Agencies on Appeal.* (1) In the case of an administrative order or decision issued to a department, agency, or instrumentality of the United States, such order or decision shall become the final order for purposes of the Federal Facility Compliance Act, 42 U.S.C.

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6961(b), in accordance with §§ 22.27(c) and 22.31 except as provided in paragraph (g)(2) of this section.

(2) In the case of an administrative order or decision issued by the Environmental Appeals Board, if the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within thirty days of the Environmental Appeals Board's service of the order or decision, a decision by the Administrator (rather than the Environmental Appeals Board) shall be the final order for the purposes of the Federal Facility Compliance Act.

(3) In the event the department, agency, or instrumentality of the United States files a motion for reconsideration with the Environmental Appeals Board in accordance with § 22.32, filing such motion for reconsideration shall not toll the thirty-day period for filing the request with the Administrator for a conference unless specifically so ordered by the Environmental Appeals Board.

(42 U.S.C. 6901, *et seq.*)

[45 FR 24363, Apr. 9, 1980, as amended at 61 FR 11092, Mar. 18, 1996]

EFFECTIVE DATE NOTE: At 45 FR 79808, Dec. 2, 1980, paragraphs (b), (c), (d), (e)(1) and (3) of § 22.37 were suspended until further notice, effective Dec. 2, 1980.

§ 22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.

(a) *Scope of these supplemental rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any Class II civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)).

(b) *Consultation with states.* The Administrator will consult with the state in which the alleged violation occurs before issuing a final order assessing a Class II civil penalty.

(c) *Public notice.* Before issuing a final order assessing a Class II civil penalty, the Administrator will provide public notice of the complaint.

(d) *Comment by a person who is not a party.* A person not a party to the Class II proceeding who wishes to comment upon a complaint must file written comments with the Regional Hearing Clerk within 30 days after public notice of the complaint and serve a copy of the comments upon each party. For good cause shown the Administrator, the Regional Administrator, or the Presiding Officer, as appropriate, may accept late comments. The Administrator will give any person who comments on a complaint notice of any hearing and notice of the final order assessing a penalty. Al-

though commenters may be heard and present evidence at any hearing held under section 309(g) of the Act, commenters shall not be accorded party status with right of cross examination unless they formally move to intervene and are granted party status under § 22.11.

(e) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the Act shall not be subject to review in an administrative proceeding for the assessment of Class II civil penalty under section 309(g).

(f) *Petitions to set aside an order and to provide a hearing.* If no hearing on the complaint is held before issuance of an order assessing a Class II civil penalty, any person who commented on the complaint may petition the Administrator, within 30 days after issuance of the order, to set aside the order and to provide a hearing on the complaint. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator will immediately set aside the order and provide a hearing in accordance with the Consolidated Rules of Practice and these supplemental rules of practice. If the Administrator denies a hearing under section 309(g)(4)(C) of the Act, the Administrator will provide to the petitioner, and publish in the FEDERAL REGISTER, notice of and the reasons for the denial.

[55 FR 23840, June 12, 1990]

§ 22.39 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of—

(i) The grounds and necessity therefor, and

(ii) The materiality and relevancy of the evidence to be adduced.

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Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was issued.

(d) *Payment of civil penalty assessed.* Payment of civil penalties finally assessed by the Regional Administrator shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository. Notice of payment must be sent by Respondent to the Hearing Clerk for inclusion as part of the administrative record for the proceeding in which the civil penalty was assessed. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

[54 FR 21176, May 16, 1989]

§ 22.40 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).

(a) *Scope of these Supplemental Rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any civil penalty

under section 325 for violations of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32) these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefore, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person against whom a civil penalty is assessed may seek judicial review in the appropriate district court of the United States by filing a notice of appeal and by simultaneously sending a copy of such notice by certified mail to the Administrator. The notice must be filed within 30 days of the date the order making such assessment was issued. The Administrator shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed.

(d) *Procedures for collection of civil penalty.* If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the Administrator may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

[54 FR 21176, May 16, 1989]

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§22.41 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Toxic Substances Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope of the Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act (the “Act”) (15 U.S.C. 2647). Where inconsistencies exist between these Supplemental rules and the Consolidated rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under section 207 of the Act shall be used by the local educational agency for purposes of complying with Title II of the Act. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

[54 FR 24112, June 5, 1989]

§22.42 Supplemental rules of practice governing the administrative assessment of civil penalties for violations of compliance orders issued under Part B of the Safe Drinking Water Act.

(a) *Scope of these supplemental rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty under section 1414(g)(3)(B). Where inconsistencies exist between these supplemental rules and the Consolidated rules, these supplemental rules shall apply.

(b) *Definition of “person.”* In addition to the terms set forth in 40 CFR 22.03(a) that define *person*, for purposes of this section and proceedings under section 1414(g)(3)(B) of the Safe Drinking Water Act, the term *person* shall also include any officer, employee, or agent of any corporation, company or association.

(c) *Issuance of complaint.* If the Administrator determines that a person has violated any provision of a compliance order issued under section 1414(g)(1) of the Safe Drinking Water Act, 42 U.S.C. 300g–3(g)(1), he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and this part.

(d) *Content of the complaint.* A complaint for the assessment of civil penalties under this part shall include specific reference to:

(1) Each provision of the compliance order issued under section 1414(g)(1) of the Act, 42 U.S.C. 300g–3(g)(1), which is alleged to have violated; and

(2) Each violation of a Safe Drinking Water Act regulation, schedule, or other requirement which served as the basis for the compliance order which is alleged to have been violated.

(e) *Scope of hearing.* Action of the Administrator with respect to which judicial review could have been obtained under section 1448 of the Safe Drinking Water Act, 42 U.S.C. 300j–7, shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 1414(g)(3)(B) of the SDWA and this part.

[56 FR 3757, Jan. 30, 1991]

§22.43 Supplemental rules of practice governing the administrative assessment of civil penalties under section 113(d)(1) of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 113(d)(1) of the Clean Air Act (42 U.S.C. 7413(d)(1)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* (1) Prior to the issuance of an administrative penalty order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Such

notice shall be provided by the issuance of a complaint pursuant to § 22.13 of the Consolidated Rules of Practice.

(2) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after service of the complaint.

(c) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of;

(i) The grounds and necessity therefor, and

(ii) The materiality and relevancy of the evidence to be adduced.

Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid in the courts of the United States.

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Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by EPA.

[57 FR 4318, Feb. 4, 1992]

**APPENDIX TO PART 22—ADDRESSES OF EPA
REGIONAL OFFICES**

Region I—John F. Kennedy Federal Building, Boston, MA 02203.

Region II—26 Federal Plaza, New York, NY 10007.

Region III—Curtis Building, 6th and Walnut Streets, Philadelphia, PA 19106.

Region IV—345 Courtland Street NE., Atlanta, GA 30308.

Region V—77 West Jackson Boulevard, Chicago, IL 60604.

Region VI—First International Building, 1201 Elm Street, Dallas, TX 75270.

Region VII—1735 Baltimore Street, Kansas City, MO 64108.

Region VIII—1860 Lincoln Street, Denver, CO 80203.

Region IX—215 Fremont Street, San Francisco, CA 94105.

Region X—1200 6th Avenue, Seattle, WA 98101.

[45 FR 24363, Apr. 4, 1980, as amended at 62 FR 1833, Jan. 14, 1997]